

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

BRADFORD C. EMERT,

Respondent.

)
)
)
)
)

Supreme Court #SC94974

INFORMANT'S BRIEF

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL



SHANNON L. BRIESACHER #53946
STAFF COUNSEL
3327 AMERICAN AVENUE
JEFFERSON CITY, MO 65109
(573) 635-7400
(573) 635-2240 (Fax)
Shannon.Briesacher@courts.mo.gov

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	1
<u>TABLE OF AUTHORITIES</u>	3
<u>STATEMENT OF JURISDICTION</u>	4
<u>STATEMENT OF FACTS</u>	5
PROCEDURAL POSTURE	5
CONDUCT UNDERLYING THE INFORMATION	8
<i>Count I-Charles Phillips</i>	8
<i>Count II-Czar Boyd, Jr.</i>	9
<i>Count III-Barbara Thornton</i>	11
<i>Count IV-Ida Parks</i>	12
DISCIPLINARY PROCEEDING	13
<u>POINTS RELIED ON</u>	15
I.	15
II.	17
III.	18
<u>ARGUMENT</u>	19
I.	19
II.	23
III.	25
<i>Aggravating and Mitigating Circumstances</i>	28
<u>CONCLUSION</u>	31

<u>CERTIFICATE OF SERVICE</u>	32
--	-----------

<u>CERTIFICATION: RULE 84.06(C)</u>	33
--	-----------

TABLE OF AUTHORITIES

CASES

<i>In re Belz</i> , 258 S.W.3d 38 (Mo. banc 2008).....	20
<i>In re Carey</i> , 89 S.W.3d 477, 483 (Mo. banc 2002).....	18, 29
<i>In re Coleman</i> , 295 S.W.3d 857, 869 (Mo. banc 2009)	18, 25
<i>In re Crews</i> , 159 S.W.3d 355, 358 (Mo. banc 2005)	16, 20
<i>In re Cupples</i> , 952 S.W.2d 226 (Mo. banc 1997)	16, 20
<i>In re Ehler</i> , 319 S.W.3d 442, 449 (Mo. banc 2010).....	16, 22
<i>In re Shelhorse</i> , 147 S.W.3d 79, 80 (Mo. banc 2004).....	20
<i>People v. Dolan</i> , 873 P.2d 766 (Co. en banc. 1994)	17, 23, 24
<i>State ex rel. Horn v. Ray</i> , 138 S.W.3d 729 (Mo.App. E.D. 2002)	16, 20

OTHER AUTHORITIES

ABA Model Rules of Professional Conduct	16, 20
ABA Standards for Imposing Lawyer Sanctions (1991 ed.).....	18, 25, 26, 27, 28, 31
ABA/BNA Lawyers Manual On Professional Conduct.....	16, 21

RULES

Rule 4-1.4	15, 16, 19, 21, 22, 31
Rule 5.27	17, 18, 23, 27

STATEMENT OF JURISDICTION

Jurisdiction over lawyer discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Procedural Posture

On December 1, 2009, the Chief Disciplinary Counsel (“Informant”) filed an Information with the Missouri Supreme Court’s Advisory Committee alleging professional misconduct on the part of Bradford Emert (“Respondent”). **App. 4-9.** The Information was based on a complaint made by Toni Snider. The parties entered into a Joint Stipulation, which contained a recommendation that Respondent receive a public reprimand from the Missouri Supreme Court. **App. 10-18.** A Disciplinary Hearing Panel was appointed and on April 22, 2010, the Disciplinary Hearing Panel issued a recommendation wherein it adopted the stipulation of the parties and recommended that Respondent receive a public reprimand. **App. 19-29.** The parties accepted the decision of the Disciplinary Hearing Panel and filed the acceptance with this Court. **App. 30.**

On June 29, 2010, the Missouri Supreme Court issued the following Order in the Toni Snider matter:

Upon Respondent filing a certification of completion of all webinars and practice management course entitled ‘Keeping Your Law Practice on Track’ through The Missouri Bar and said certification on or before January 1, 2011, the Court will issue a reprimand in this cause so long as there are no intervening matters warranting further review by the Court.¹

¹ The Court’s Order predated the January, 2013 amendment to Rule 5.225, allowing for a reprimand with requirements.

App. 31.

Respondent attended the law practice management course referenced in the Court's Order, but failed to file a certificate of completion with the Court. **App. 36; 40; 41; 198.** As such, the reprimand in the Toni Snider matter was never issued.

On January 12, 2011, twelve days after Respondent's deadline for filing his certificate of completion, Respondent was suspended by Order of the Missouri Supreme Court for failure to pay taxes. **App. 42-43.** Informant had also received an additional client complaint alleging misconduct on the part of Respondent. **App. 32-33; 66.** Therefore, on February 8, 2011, and pursuant to Rule 84.20, Informant directed correspondence to Missouri Supreme Court Clerk, Thomas Simon, advising the Court of Respondent's status and the unresolved reprimand in the Toni Snider matter. **App. 32-33.** Informant received no response or directive from the Court.

On March 22, 2011, Respondent filed a Petition for Reinstatement After Non-Payment of Tax with the Missouri Supreme Court. **App. 44-48.** Respondent stated in his petition that he had negotiated a repayment agreement with the Missouri Department of Revenue. **App. 44-48.** In lieu of automatic reinstatement and because of the unresolved client complaint pending with the Office of Chief Disciplinary Counsel, Informant requested an opportunity to investigate Respondent's Petition for Reinstatement. **App. 49.** Leave was granted by the Court in April, 2011. **App. 49.**

Throughout Respondent's tax suspension and the pendency of his reinstatement, Informant continued to receive client complaints against Respondent, some of which are the basis for the underlying matter currently before the Court. **App. 67; 167-168; 191-**

199. Informant was required to investigate the additional complaints and continued to process Respondent's reinstatement application. **App. 67.** In addition, Informant was unable to contact Respondent for a period of many months due to unreported address and telephone number changes. **App. 168.** On February 15, 2013, Informant filed its Report and Recommendation with the Court, outlining the issues with the pending client complaints and expressing its concern about Informant's inability to contact Respondent. **App. 166-171.** Immediately after Informant filed its Report and Recommendation, Informant was contacted by Respondent via telephone and informed that Respondent's offer in compromise and repayment agreement with the Missouri Department of Revenue had been terminated by the Department for Respondent's failure to make timely repayments. **App. 173.** Given the totality of the circumstances, Informant could not recommend Respondent's Reinstatement and filed a Supplemental Recommendation, indicating the same. **App. 172-174.** On March 1, 2013, Respondent filed a Motion to Dismiss his reinstatement application, which was sustained the same day. **App. 175-176.** Respondent remains tax suspended.

On March 19, 2013, this Court issued a Show Cause Order, directing Respondent to show cause why a reprimand should not be increased to a more severe discipline, including disbarment, as a result of his failure to timely file compliance with the Court's order of June 29, 2010 and for failure to pay taxes. **App. 34-35.** On April 10, 2013, Respondent filed his response to the Show Cause Order. **App. 36-41.** No further action was taken by the Court.

Respondent was born March 22, 1961, and was licensed to practice law in Missouri on October 10, 1986. The address Respondent designated in his most recent registration with The Missouri Bar is PO Box 11727, St. Louis, MO 63105.²

Conduct Underlying the Information

Count I-Charles Phillips

In January, 2001, Respondent was hired to represent Charles Phillips in a potential workers' compensation claim. Mr. Phillips' claim for workers' compensation included a claim against Missouri's Second Injury Fund. **App. 191-192.** At mediation, the judge in the matter recommended that the Second Injury Fund pay \$10,000.00 to resolve Mr. Phillips' claim. **App. 191-192.** The attorney representing the fund did not have authority to settle for \$10,000.00, but said she would try to obtain authority, thereafter. **App. 191-192.**

On or about October 9, 2009, Respondent received a letter from the Second Injury Fund indicating that the fund was not making any voluntary offers and that previous offers were being withdrawn. **App. 191-192.** Mr. Phillips' workers' compensation claim settled, but his Second Injury Fund claim remained on the dockets. **App. 192.** On January 12, 2011, Respondent was suspended from the practice of law in Missouri for

² Respondent has indicated that he no longer maintains this address. Therefore, all pleadings have been simultaneously sent to Respondent's home address at 5 Colonial Hills Parkway, St. Louis, MO 63141.

failure to pay and/or register Missouri state taxes. **App. 42-43.** Respondent failed to notify Mr. Phillips of Respondent's suspension and failed to withdraw from Mr. Phillips' case. **App. 192.** Respondent also failed to return Mr. Phillips' file immediately upon Respondent's suspension. **App. 192.**

On March 14, 2012, Mr. Phillips received notice that a prehearing conference was to be held on April 24, 2012. **App. 192.** Mr. Phillips repeatedly attempted to contact Respondent, but Respondent did not return Mr. Phillips' telephone calls. **App. 192.** Respondent did not have a telephone for a period of time following Respondent's suspension. **App. 192.** Mr. Phillips attended the April 24, 2012 conference without representation, but was told by the judge that Mr. Phillips needed to contact his attorney. **App. 192.** On July 6, 2012, Mr. Phillips filed a complaint with the Office of Chief Disciplinary Counsel ("OCDC"). **App. 192.** Mr. Phillips' Second Injury case is still pending and Respondent believes that Mr. Phillips continues to have a valid claim against the Second Injury Fund. **App. 192.**

Count II-Czar Boyd, Jr.

On or about January 26, 2009, Complainant, Czar Boyd, Jr., instituted a wrongful death action stemming from the death of his son. **App. 192-194.** Mr. Boyd alleged that while his son was incarcerated, officials failed to properly and timely diagnose his son's cancer, a rare and particularly aggressive cancer. **App. 192-194.** On April 28, 2010, Mr. Boyd's attorney notified Mr. Boyd that he could not locate an expert to sustain a claim and informed Mr. Boyd that he would be dismissing Mr. Boyd's case without prejudice.

App. 193. On May 6, 2010, Mr. Boyd's case was dismissed without prejudice. **App. 193.**

Mr. Boyd had one year to refile his action under the savings statute (on or before May 6, 2011). **App. 193.** On May 24, 2010, Mr. Boyd hired Respondent to pursue the wrongful death claim on Mr. Boyd's behalf. **App. 193.** Respondent and Mr. Boyd contracted on a contingency fee basis for a 40% contingency fee. **App. 193.** In the following months, Respondent was unable to locate a medical expert to support Mr. Boyd's wrongful death action. **App. 193.** Respondent failed to inform Mr. Boyd that Respondent could not locate a medical expert and failed to inform Mr. Boyd that without a medical affidavit from an expert, Respondent could not refile Mr. Boyd's lawsuit. **App. 193.**

On or about January 12, 2011, Respondent was suspended from the practice of law in Missouri for failure to pay and/or register Missouri state taxes. **App. 42-43.** Respondent failed to notify Mr. Boyd of Respondent's suspension and failed to return Mr. Boyd's file. **App. 194.** Mr. Boyd was incarcerated and was unable to contact Respondent by telephone, as Respondent blocked all incoming calls from prisons. **App. 194.** Respondent did not refile Mr. Boyd's lawsuit within the one year following the dismissal of Mr. Boyd's original suit. **App. 194.** Respondent also failed to tell Mr. Boyd that the one year time period for filing had passed without the filing of a new lawsuit. **App. 194.**

Count III-Barbara Thornton

On December 30, 2003, Complainant, Barbara Thornton, was given a prescription for Cozar to treat high blood pressure. **App. 194-196.** Ms. Thornton had the prescription filled at Walgreens and claimed that Walgreens mistakenly filled the prescription with Doc-Q-Lace, a laxative. **App. 194.** On March 18, 2004, Ms. Thornton hired the firm of Ryals and Soffer to pursue a claim against Walgreens. **App. 194.** Ms. Thornton's doctor submitted a causation report that stated Ms. Thornton took the medication for one month and felt tired, had joint pain, and had increased blood pressure. **App. 195.** Ms. Thornton demanded a \$750,000.00 settlement, while her attorney felt that \$175,000.00 was more reasonable. **App. 195.** The case never settled, nor was a lawsuit filed and the firm returned the case to Ms. Thornton. **App. 195.**

On or about August 23, 2006, Ms. Thornton hired Respondent to pursue a legal malpractice action against the firm that handled the case. **App. 195.** While Ms. Thornton felt that her injuries were permanent and that her doctor's causation report was flawed, Respondent was unable to obtain a doctor's report that could dispute the original doctor's findings. **App. 195.** Respondent did not feel that he could prove that Ms. Thornton would have prevailed in an action against Walgreens. **App. 195.** Respondent failed to file a malpractice action against Ms. Thornton's previous attorneys. **App. 195.**

On January 12, 2011, Respondent was suspended from the practice of law in Missouri for failure to pay and/or register Missouri state taxes. **App. 42-43.** Respondent failed to inform Ms. Thornton that he had been suspended from the practice of law in Missouri and failed to return Ms. Thornton's file upon his suspension from the practice of

law. **App. 196.** On August 22, 2011, Ms. Thornton filed a complaint with the OCDC. **App. 196.**

Count IV-Ida Parks

On January 12, 2007, Complainant, Ida Parks, alleges that she fell to the ground while being transferred from her bed to a wheelchair in the care of her nursing home. Medical records indicated that Ms. Parks suffered a hematoma on her leg. On January 21, 2007, Ms. Parks, through her daughter, hired Respondent to pursue a medical malpractice action. **App. 196-197.**

In January, 2009, Respondent filed a lawsuit on behalf of Ms. Parks in St. Louis County. **App. 196.** Because Ms. Parks had a number of preexisting conditions, Respondent was unable to procure a causation expert who could tie the incident to the other injuries claimed by Ms. Parks, including injuries to her neck and spine. **App. 196.** Respondent requested a second opinion from a veteran medical malpractice attorney, who concluded that Ms. Parks sustained a hematoma to her knee and would enjoy a reasonable recovery. **App. 196.** On October 26, 2009, Respondent dismissed the case without prejudice. **App. 196.**

During the course of the next year, Respondent continued to try and procure an expert regarding causation. **App. 197.** Respondent failed to communicate to Ms. Parks that his inability to retain a medical expert would prevent Respondent from moving forward with her case. **App. 197.** Respondent sent a letter to Ms. Parks on April 29, 2010, that stated:

In order to pursue a medical negligence claim, we have to establish that the actions or inactions of a health care provider caused or contributed to the cause of your injuries and that their actions or inactions fell below the established standard of care.

Standard of care is that degree of learning and skill ordinarily used under similar circumstances by reputable and careful members of the profession. This standard must be established by an expert witness and proven that said standard of care was breached. Additionally, we must also establish that the damages or injuries you sustained were a direct result of the incident of January 12, 2007.

We have presented your records to several experts, who have not been able to establish sufficient facts.

App. 197.

Respondent failed to communicate to Ms. Parks that Respondent would refile her case following the dismissal if the causation issue could be remedied. **App. 197.** On May 3, 2010, Ms. Parks filed a complaint with the OCDC. **App. 197.**

In October, 2010, Respondent refiled Ms. Parks' case, though he had no medical expert. Thereafter, Ms. Parks terminated Respondent's services. **App. 197.**

Disciplinary Proceeding

An Information was filed with the Advisory Committee on January 22, 2015, setting forth Informant's belief that probable cause existed to establish that Respondent violated multiple Rules of Professional Conduct in the cases of Charles Phillips, Czar

Boyd, Barbara Thornton and Ida Parks. **App. 177-188.** Informant and Respondent also entered into a Joint Stipulation, which was conclusive as to the allegations contained in the Information. **App. 189-213.** Recognizing the unusual aspect of the present case, the parties proposed that Respondent be placed on probation with terms for a period of two years and that the probation become effective upon Respondent's reinstatement to the practice of law, which would require Respondent to attain reinstatement, but would also allow the Court to simultaneously issue or otherwise dispose of Respondent's public reprimand in the Toni Snider case. **App. 202-205.**

On January 29, 2015, a Disciplinary Hearing Panel was appointed (**App. 214-216**) and a brief hearing was held on March 19, 2015. **App. 218-235.** Thereafter, the Disciplinary Hearing Panel issued its Decision unanimously adopting the facts, conclusions, recommendations and proposed order set forth in the Joint Stipulation. **App. 236-261.** The parties filed their respective acceptances of the Disciplinary Hearing Panel's Decision and on June 24, 2015, this Court ordered that a record be filed and that the matter be briefed and argued before the Court. **App. 262; 263.**

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROPERLY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT:

- a. FAILED TO TELL MR. BOYD THAT RESPONDENT WAS UNABLE TO LOCATE A MEDICAL EXPERT THAT COULD SUPPORT MR. BOYD'S CLAIM;**
- b. NEGLECTED TO INFORM MR. BOYD THAT RESPONDENT WOULD BE UNABLE TO REFILE MR. BOYD'S CASE WITHIN THE ONE YEAR TIMEFRAME OF THE SAVINGS STATUTE;**
- c. DID NOT NOTIFY MS. THORNTON THAT RESPONDENT DID NOT BELIEVE THAT HE COULD SUSTAIN A MALPRACTICE ACTION AGAINST MS. THORNTON'S FORMER ATTORNEYS;**
- d. FAILED TO INFORM MS. PARKS THAT RESPONDENT'S INABILITY TO RETAIN A MEDICAL EXPERT WOULD PREVENT RESPONDENT FROM MOVING FORWARD WITH HER CASE; AND**

- e. **NEGLECTED TO INFORM MS. PARKS THAT HE WOULD
REFILE MS. PARKS' CASE FOLLOWING THE DISMISSAL
IF THE CAUSATION ISSUE COULD BE REMEDIED.**

In re Ehler, 319 S.W.2d 442, 49 (Mo. banc 2010)

In re Cupples, 952 S.W.2d 226 (Mo. banc 1997)

State ex rel. Horn v. Ray, 138 S.W.3d 729 (Mo.App. E.D. 2002)

In re Crews, 159 S.W.3d 355, 358 (Mo. banc 2005)

ABA/BNA Lawyers Manual On Professional Conduct

ABA Model Rules of Professional Conduct

Rule 4-1.4

POINTS RELIED ON

II.

**THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S
LICENSE BECAUSE RESPONDENT DID NOT UTILIZE PROPER
PROCEDURE FOLLOWING RESPONDENT'S TAX SUSPENSION
IN VIOLATION OF RULE 5.27 IN THAT RESPONDENT:**

- a. FAILED TO NOTIFY MR. PHILLIPS, MR. BOYD AND MS.
THORNTON OF RESPONDENT'S SUSPENSION FROM THE
PRACTICE OF LAW;**
- b. NEGLECTED TO WITHDRAW FROM MR. PHILLIPS' CASE
UPON RESPONDENT'S SUSPENSION FROM THE PRACTICE
OF LAW; AND**
- c. FAILED TO RETURN MR. PHILLIPS', MR. BOYD'S AND MS.
THORNTON'S FILES FOLLOWING RESPONDENT'S
SUSPENSION FROM THE PRACTICE OF LAW.**

People v. Dolan, 873 P.2d 766 (Co. en banc. 1994)

Rule 5.27

POINTS RELIED ON

III.

UPON RESPONDENT’S REINSTATEMENT TO THE PRACTICE OF LAW, THE SUPREME COURT SHOULD ISSUE THE REPRIMAND RESERVED IN THE TONI SNIDER MATTER AND PLACE RESPONDENT ON PROBATION FOR A PERIOD OF TWO YEARS SUBJECT TO TERMS AND CONDITIONS OF COMPLETION BECAUSE PROBATION IS APPROPRIATE WHEN THE NATURE OF RESPONDENT’S VIOLATIONS ARE NOT SO EGREGIOUS AS TO WARRANT SUSPENSION OR DISBARMENT BUT REQUIRES MONITORING BY THE DISCIPLINARY SYSTEM.

In re Coleman, 295 S.W.2d 857, 869 (Mo. banc 2009)

In re Carey, 89 S.W.3d 477, 483 (Mo. banc 2002)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 5.27

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT FAILED TO PROPERLY COMMUNICATE WITH HIS CLIENTS IN VIOLATION OF RULE 4-1.4(a) IN THAT RESPONDENT:

- a. FAILED TO TELL MR. BOYD THAT RESPONDENT WAS UNABLE TO LOCATE A MEDICAL EXPERT THAT COULD SUPPORT MR. BOYD'S CLAIM;**
- b. NEGLECTED TO INFORM MR. BOYD THAT RESPONDENT WOULD BE UNABLE TO REFILE MR. BOYD'S CASE WITHIN THE ONE YEAR TIMEFRAME OF THE SAVINGS STATUTE;**
- c. DID NOT NOTIFY MS. THORNTON THAT RESPONDENT DID NOT BELIEVE THAT HE COULD SUSTAIN A MALPRACTICE ACTION AGAINST MS. THORNTON'S FORMER ATTORNEYS;**
- d. FAILED TO INFORM MS. PARKS THAT RESPONDENT'S INABILITY TO RETAIN A MEDICAL EXPERT WOULD PREVENT RESPONDENT FROM MOVING FORWARD WITH HER CASE; AND**

**e. NEGLECTED TO INFORM MS. PARKS THAT HE WOULD
REFILE MS. PARKS' CASE FOLLOWING THE DISMISSAL
IF THE CAUSATION ISSUE COULD BE REMEDIED.**

A disciplinary hearing panel's recommendation is advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). In a disciplinary matter such as this, the Missouri Supreme Court conducts a *de novo* review of the evidence and reaches its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id.* Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004).

In 1986, Missouri adopted the American Bar Association's Model Rules of Professional Conduct and though the Rules in Missouri now exist with variation, the Model Rules are used by a majority of other states, making other state disciplinary cases relevant to Missouri disciplinary matters. *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo.App. E.D. 2002) and www.abanet.org/cpr/mrpc/model_rules.html (last visited June, 2014) (indicating that California is the only state that has not adopted professional conduct rules that follow the format of the ABA Model Rules). See also *In re Cupples*, 952 S.W.2d 226 (Mo. banc 1997) and *In re Belz*, 258 S.W.3d 38 (Mo. banc 2008) (where this Court analyzed other state disciplinary law in reaching a conclusion in Missouri).

In the present action, the facts are not in dispute. Respondent admits that in the cases of Mr. Boyd, Ms. Thornton and Ms. Parks, Respondent failed to inform his clients that Respondent was having difficulty proceeding in their cases and then failed to keep

them informed of the events thereafter. Respondent contends that in each of the cases set forth above, Respondent felt that the chances of a successful outcome were not good and failed to be as straightforward with his clients as was needed. However, Rule 4-1.4 states that a lawyer shall keep the client reasonably informed about the status of the matter, irrespective of whether those developments are positive or negative. Keeping a client informed entails informing the client of court dates, motions and pleadings filed on their behalf, dismissals, and changes in the lawyer's contact information, as well as providing copies of documents and responding to client telephone calls and letters. ABA/BNA Lawyers Manual on Professional Conduct, *Lawyer Client Relationship* § 31:501 (2005). "Reasonable communication between the client and the lawyer is necessary for the client effectively to participate in the representation." Rule 4-1.4, Comment [1].

In the present action, Respondent's failure to keep his clients informed of the status of their actions rendered them unable to make informed decisions about how they wanted to proceed or whether it was worth proceeding in their respective actions. Mr. Boyd's wrongful death action had been previously dismissed by a former attorney with one year to refile. Within days of the initial dismissal, Mr. Boyd hired Respondent to refile the action. Respondent states that in the following months, he was unable to locate a medical expert to support Mr. Boyd's wrongful death action, but failed to tell Mr. Boyd the same. Respondent further failed to inform Mr. Boyd that without a medical affidavit from an expert, Respondent would be unable to refile Mr. Boyd's lawsuit. In the end, Respondent was suspended from the practice of law and without refiling Mr. Boyd's lawsuit, Respondent failed to tell Mr. Boyd that the one year time period for filing had

passed. This left Mr. Boyd unable to make an informed decision about whether Mr. Boyd wanted to seek new counsel or make a conscious decision to abandon the lawsuit.

Similarly, Respondent agreed to represent Ida Parks in a medical malpractice action. Respondent filed the lawsuit, but was unable to procure a causation expert and ultimately dismissed the case without prejudice. Respondent maintains that during the course of the next year, he continued to try and procure an expert, but because he did not keep Ms. Parks apprised of the status of her case, she felt that nothing was being done and she filed a complaint with the Office of Chief Disciplinary Counsel. In the case of Barbara Thornton, Respondent agreed to represent Ms. Thornton in a malpractice action against her former attorneys. After taking the case, Respondent concluded that he could not prove that Ms. Thornton would have been successful in her underlying lawsuit but for the malpractice of her former attorneys. Respondent was thereafter suspended from the practice of law and did not communicate to Ms. Thornton that he would not be filing her malpractice action, nor did he communicate that he felt the action would be unsuccessful.

This Court has said that “[c]ommunication with a client is essential to maintain a productive attorney-client relationship.” *In re Ehler*, 319 S.W.3d 442, 449 (Mo. banc 2010). Respondent’s clients were unable to make meaningful decisions with respect to their cases because Respondent failed to inform them of events, sometimes determinative, that were transpiring in their actions. As such, Respondent repeatedly violated Rule 4-1.4.

ARGUMENT

II.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT DID NOT UTILIZE PROPER PROCEDURE FOLLOWING RESPONDENT'S TAX SUSPENSION IN VIOLATION OF RULE 5.27 IN THAT RESPONDENT:

- a. FAILED TO NOTIFY MR. PHILLIPS, MR. BOYD AND MS. THORNTON OF RESPONDENT'S SUSPENSION FROM THE PRACTICE OF LAW;**
- b. NEGLECTED TO WITHDRAW FROM MR. PHILLIPS' CASE UPON RESPONDENT'S SUSPENSION FROM THE PRACTICE OF LAW; AND**
- c. FAILED TO RETURN MR. PHILLIPS', MR. BOYD'S AND MS. THORNTON'S FILES FOLLOWING RESPONDENT'S SUSPENSION FROM THE PRACTICE OF LAW.**

Rule 5.27 states that between the entry date of an order of suspension and its effective date, the lawyer shall withdraw from representation in any pending matters. Following the effective date of an order of suspension, an attorney shall notify all clients in writing and deliver to all clients any papers or other property to which they are entitled. In *People v. Dolan*, the Supreme Court of Colorado determined that a lawyer's failure to notify his clients of the lawyer's three month suspension and failure to withdraw from the client's case was a violation of the

Rules that warranted discipline beyond the initial suspension. *People v. Dolan*, 873 P.2d 766 (Co. en banc. 1994).

Here, Respondent contends that upon his suspension, he made arrangements to transfer the majority of his cases to another firm. However, in the cases of Mr. Phillips, Mr. Boyd and Ms. Thornton, Respondent made no arrangements to transfer their cases and failed to notify them of his suspension altogether. In the case of Mr. Phillips, his Second Injury Fund claim remained open and on the dockets. Respondent believes it to be a viable claim, but because Respondent failed to notify Mr. Phillips of Respondent's suspension, no action was taken on the case for over a year. Additionally, because Respondent failed to withdraw from the case, notices continued to be sent to Respondent, frustrating Mr. Phillips who appeared at a prehearing conference without his attorney.

In failing to notify his clients of his suspension, Respondent frustrated the progress that his clients might have made on their cases. In failing to withdraw from representation, Respondent abandoned an active case. And in failing to return his clients' files, Respondent made it more difficult for his clients to move forward in pursuing their cases without Respondent.

ARGUMENT

III.

UPON RESPONDENT’S REINSTATEMENT TO THE PRACTICE OF LAW, THE SUPREME COURT SHOULD ISSUE THE REPRIMAND RESERVED IN THE TONI SNIDER MATTER AND PLACE RESPONDENT ON PROBATION FOR A PERIOD OF TWO YEARS SUBJECT TO TERMS AND CONDITIONS OF COMPLETION BECAUSE PROBATION IS APPROPRIATE WHEN THE NATURE OF RESPONDENT’S VIOLATIONS ARE NOT SO EGREGIOUS AS TO WARRANT SUSPENSION OR DISBARMENT, BUT REQUIRES MONITORING BY THE DISCIPLINARY SYSTEM.

When considering the level of discipline to impose for violation of the Rules of Professional Conduct, this Court relies on the American Bar Association model rules for attorney discipline (“ABA Standards”). *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). Under Section II, The Theoretical Framework, the Standards state that each court imposing sanctions must consider the ethical duty and to whom it is owed, the attorney’s mental state, the amount of injury caused by the attorney’s misconduct and any aggravating or mitigating factors. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 5. The Theoretical Framework of the ABA Standards also provides that when an attorney violates multiple Rules of Professional Responsibility, as is charged in the case of Respondent, the ultimate sanction imposed should be at least

consistent with the sanction for the most serious instance of misconduct and often should be greater than the sanctions for the most serious misconduct. *Id.*

This case is unusual in that it began with a reprimand in the Toni Snider case that was never issued after Respondent failed to report to the Court his attendance at a law practice management course. As such, the Court must now determine whether it wishes to administer the reprimand or discard it in favor of alternative sanctioning. As an intervening matter, Respondent was tax suspended and was unable to be reinstated after he defaulted on his repayment agreement with the Missouri Department of Revenue, following a lengthy reinstatement process. Because Respondent remains tax suspended, no reprimand could be administered until Respondent is reinstated to practice law.

In the present action, Respondent violated a duty owed to his clients in failing to appropriately communicate with his clients and failing to notify his clients of Respondent's suspension. Respondent did not intend to injure his clients, but negligently failed to notify his clients of Respondent's suspension from the practice of law, affecting their ability to proceed with their respective cases. Respondent took responsible action in trying to transfer his active cases to another practicing attorney. However, following several years of personal difficulty and the closing of Respondent's practice, Respondent contends that he overlooked Mr. Phillips' case and simply failed to address challenging cases that did not, in Respondent's estimation, have much chance of recovery. Respondent's clients were injured in that they were unable to seek other representation in a timely manner.

ABA Standard 4.4, pertaining to Respondent's lack of proper communication with his clients provides that a reprimand is appropriate when a lawyer is negligent in representing a client, whereas a suspension is appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect. In the present circumstance, Respondent engaged in multiple instances of failing to inform his clients of the status of their litigation, which may make a suspension the more appropriate disposition of these matters. Respondent's violation of Rule 5.27, while it certainly affects his clients, more aptly pertains to Respondent's duties to the profession, which is addressed by ABA Standard 7.0. Standard 7.2 provides that a suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, whereas a reprimand is more appropriate when the lawyer is negligent in his actions. In the present case, Respondent transferred the majority of his cases to another firm, but neglected to transfer or dispose of three cases, which indicates that Respondent's actions were negligent, rather than intentional, and may make a reprimand the more appropriate disposition.

With the exception of the complaint by Ida Parks, the complaints against Respondent were received after Respondent's suspension from the practice of law, which was the direct result of Respondent's tax suspension. While Respondent's conduct was a breach of his duty to his clients, the clients did not complain about Respondent's conduct during the active phase of Respondent's representation. Respondent became overwhelmed with his personal circumstances, discussed below, and failed to appropriately dispose of several of his client cases upon his suspension. Nevertheless,

evidence would indicate that Respondent is capable of resuming a successful and compliant practice pending his reinstatement into the practice of law. The Commentary to ABA Standard 2.7 states:

Probation is a sanction that should be imposed when a lawyer's right to practice law needs to be monitored or limited rather than suspended or revoked... Probation is appropriate for conduct which may be corrected, e.g. improper maintenance of books and records, lack of timely communication with clients, failure to file income tax returns or alcohol and chemical dependency.

In Respondent's case, Informant believes that Respondent is capable of learning and implementing procedures to begin appropriately communicating with clients. Respondent was cooperative in the investigation of the Office of Chief Disciplinary Counsel and provided all documentation when requested. There is reason to conclude that Respondent would cooperate in monitoring during a period of probation, as well. Because Respondent is currently suspended, a period of probation would be moot unless Respondent was reinstated to active practice. Further, a sanction more severe than that of suspension would be inappropriate in the present action, given the nature of the complaints.

Aggravating and Mitigating Circumstances

The American Bar Association Standards provide that once misconduct is established, it is appropriate to evaluate the aggravating and mitigating circumstances in considering what sanction to impose. Standards for Imposing Lawyer Sanctions, American Bar Association, 1991, pg. 49. In the present case, aggravating factors include

Respondent's multiple offenses and substantial experience in the practice of law. Mitigating factors include the absence of a dishonest or selfish motive, personal or emotional problems, a timely good faith effort to rectify the consequences of the misconduct, a cooperative attitude towards the disciplinary proceedings and remorse.

The totality of the circumstances might indicate that the Respondent has little regard for the Rules and Orders of the Court, insomuch as Respondent failed to file his attendance at the law practice management course as ordered by the Court and thereafter conceded to additional violations of the Court Rules in the cases before the Court presently. However, Respondent states that in 2007, Respondent's mother died of lung cancer and in 2008, Respondent went through a contentious divorce. In 2009, Respondent's house was going through foreclosure and Respondent's mood affected his ability to deal with his cases. The facts seem to infer that Respondent's actions were not the result of a blatant disregard for the Rules and Orders of the Court, but perhaps of an attorney struggling through difficult circumstances and not being proactive in making the correct decisions.

It is well established that the purpose of attorney discipline is not to punish the attorney, but to "protect the public and maintain the integrity of the legal profession." *In re Carey*, 89 S.W.3d 477, 483 (Mo. banc 2002). The parties agreed to and the Disciplinary Hearing Panel recommended that upon Respondent's reinstatement to the practice of law, the reprimand in the Toni Snider matter might be issued and Respondent be placed on probation for a period of two years with terms and conditions. It will still be incumbent on Respondent to take the actions necessary for reinstatement and pursuant to

the Rules, it will ultimately be up to this Court as to whether to grant Respondent reinstatement. However, this course of action permits the disposal of all pending and outstanding matters regarding Respondent's discipline.

CONCLUSION

For the reasons set forth above, the Chief Disciplinary Counsel respectfully requests this Court:

- (a) find that Respondent violated Rules 4-1.4 and 5.27;
- (b) place Respondent on probation upon his reinstatement to practice law; and
- (c) tax all costs in this matter to Respondent, including the \$1,500.00 fee for probation, pursuant to Rule 5.19(h).

Respectfully submitted,

ALAN D. PRATZEL #29141
CHIEF DISCIPLINARY COUNSEL



By: _____
Shannon L. Briesacher #53946
Staff Counsel
3327 American Avenue
Jefferson City, MO 65109
(573) 635-7400 – Phone
(573) 635-2240 – Fax
Shannon.Briesacher@courts.mo.gov

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2015, a copy of Informant's Brief was served upon Respondent's counsel via the electronic filing system pursuant to Rule 103.08:

Sara G. Rittman
1709 Missouri Boulevard, Suite 2, #314
Jefferson City, MO 65109
Attorney for Respondent

AND

Hereby certify that on this 24th day of July, 2015, two copies of Informant's Brief were sent via regular mail, postage prepaid, to Respondent at:

Bradford C. Emert
P. O. Box 11727
St. Louis, MO 63105-1727

Bradford C. Emert
5 Colonial Hills Parkway
St. Louis, MO 63141



Shannon L. Briesacher

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 5,996 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and



Shannon L. Briesacher